

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
(302) 856-5257

August 8, 2011

N440 State Mail  
Ezra Pendleton  
James T. Vaughn Correctional Center  
1181 Paddock Road  
Smyrna, DE 19977

**RE: State v. Pendleton**  
**Defendant ID# 0810005749 (R-1)**  
**Motion for Post Conviction Relief Pursuant to Superior Court**  
**Criminal Rule 61 ("Rule 61")**

Dear Mr. Pendleton:

A decision denying your post conviction motion was made on April 8, 2011. On May 13, 2011, you complained that you did not receive a copy of your attorney's Rule 61(g) affidavit and therefore, you could not have filed a reply Rule 61(g) affidavit. I vacated the decision and, with the benefit of reviewing your attorney's affidavit, you filed your reply on July 26, 2011. I have reviewed all of the submissions, as well as the transcript of the suppression hearing before Judge E. Scott Bradley. Even with the new submissions I find this motion must be denied.

**BACKGROUND**

At the time of your arrest on the present charges you were on probation for older charges. An administrative search of your residence was conducted by the Probation Department. The Governor's Task Force was involved in the implementation of Operation Safe Streets at the time of the search.

Following a suppression hearing some of the evidence was suppressed, but not the most inculpatory evidence.

At trial you had another attorney who discussed with you the problems concerning the inculpatory evidence. It was agreed between your attorney and you that your only real opportunity to prevail was by attacking the suppression decision on appeal. A stipulated trial was agreed upon. The stipulated trial was to avoid the inability of an appeal if you pled guilty. You were found guilty of Possession with the Intent to Deliver Cocaine and Maintaining a Vehicle. You were found not guilty of Tampering with Evidence. Unfortunately, your prior record triggered a habitual offender minimum sentence of fifteen years.

Your appeal as to the suppression motion was not successful. *Pendleton v. State*, 990 A.2 417 (Del.2010).

### **THE ALLEGATIONS**

In grounds one and two you renew your attack as to the search. These issues are procedurally barred because of their prior adjudication in Superior Court and in the Supreme Court. Rule 64(i)(4).

Grounds three through five involve ineffective assistance of counsel claims against both of your attorneys. Therefore, you must prove your attorneys' committed professional errors or omissions that actually prejudiced you. Conclusory allegations fail as you must specify the errors or mistakes as well as the prejudicial impact. *Strickland v. Washington*, 466 U.S. 668 (1994).

In ground three, you claim trial counsel was ineffective for not interviewing witnesses and investigating your case. You reported the names of two witnesses but offered nothing as to how they could help you.

In your Rule 61(g) affidavit you report that one of these witnesses would have testified that the cocaine was hers. You reported you only confessed to the charges to protect her and this should have been the tactic at trial. You allege this was discussed with your attorney. Your attorney reports that his communications with you involved the suppression ruling being your headache. The suppression decision allowed the evidence and your subsequent confession to come into evidence at trial.

A review of the stipulated facts, which you signed the morning of trial, contains admissions which are contrary to your present allegations.

This stipulation came after your attorney-client conferences and in the stipulation you (a) admit you possessed the cocaine intending to deliver it to others and (b) you acknowledged that there was sufficient evidence for you to be found guilty. The court inquired if there was any other evidence to be considered. In your presence, I was informed the stipulation was all of the evidence to be considered by the Court.

Therefore, I conclude your present claim that your attorney should have interviewed your girlfriend and presented her testimony as a defense at trial has not been established. The record reflects your admissions at trial by way of the stipulation, and your present position conflicts with the time line presented above. You have not established or proven your attorney failed to investigate a witness who would have exonerated you. Simply put, I find your position lacks credibility.

In ground three you also allege trial counsel should have subpoenaed the phone records of the Probation Department to determine if there had truly been a telephone conversation authorizing the administrative search. Your trial counsel correctly notes that this was a moot point since the suppression of the administrative search had been denied prior to him becoming involved in defending you. This ground is denied.

In ground four you allege your suppression counsel failed to conduct a proper investigation. Specifically, you allege counsel failed to put the State to its burden of proof at the suppression hearing by making the State prove not only that the telephone call was made authorizing the search, but also when it was made. You also complain that suppression counsel did not attack the necessity of the police conducting a protective or security sweep of the residence prior to the search. Finally, you make a complaint that your attorney failed to establish that certain objects were moved or not moved in order to locate the drugs.

To address this claim I have reviewed the transcripts of the suppression hearing. A probation officer and his supervisor both testified under oath that a call requesting permission to search was made. They testified in detail as to the criteria they discussed as to the administrative search protocol. Defense counsel's duty to investigate must be assessed in light of the circumstances that existed at the time of the investigating decisions. *State v. Censurato*, Cr. A. No. IN-94-02-0019 (Del. Super. Dec. 1, 1995). Based upon the testimony, I am satisfied the administrative search was valid and that your present argument is just a fishing expedition.

I am also satisfied that a security or protective sweep of a residence to be searched is reasonable and appropriate to protect all involved and to ensure someone in the residence does not destroy potential evidence.

Finally, as to the last claim, I find that, since a search was authorized, whether the seized evidence was in plain view or behind an object is irrelevant.

In summary, I find you have not established that your suppression counsel committed error, nor do I find you have established any prejudice arising from the claims in Ground Four.

Ground five is a repeat of the claim in ground four concerning challenging the existence of the phone call. For the reasons state above, this ground is denied.

In Ground six you argue you did not knowingly and intelligently waive your right to

testify. Trial counsel reports he reviewed your circumstances with you and what the stipulated trial would include. Included was the DVD recording of your admissions to the police.

In making my decision as to this complaint, I rely upon the stipulation signed by your attorney and you. It is clear you were acknowledging your guilt and preserving your right to appeal the suppression hearing. It is clear that when the Court asked if there was anything else to be presented nothing else was offered.

Under the above facts, I am satisfied you knew exactly what you were doing and that you were not orally testifying. I am satisfied you and your attorney fully discussed this and the decision was yours. You signed a stipulation of facts specifically outlining what you acknowledged you did was your conduct. Therefore, you presented this stipulation as your testimony. This ground is denied.

In summary, grounds one and two are procedurally barred. As to the remaining allegations in grounds three through six you have failed to establish your claims. The Rule 61 motion is denied.

IT IS SO ORDERED

Yours very truly,

/s/ T. Henley Graves

THG:pac

cc: Prothonotary

John Donahue, Esquire, Department of Justice

John Daniello, Esquire, Office of the Public Defender

Michael Abram, Esquire